

Karen O. Moury
717.237.6036
kmoury@eckertseamans.com

April 25, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

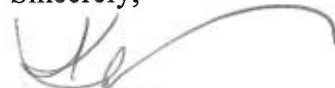
Re: Pa. P.U.C. Bureau of Investigation and Enforcement v. Xtreme Energy Company
Docket No. C-2017-2599145

Dear Secretary Chiavetta:

Enclosed for electronic filing, please find the Prehearing Conference Memorandum of Xtreme Energy Company with regard to the above-captioned matter.

Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury
KOM/lww
Enclosure

cc: Hon. Joel Cheskis w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Xtreme Energy Company's Prehearing Conference Memorandum upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email and First Class Mail

Heidi L. Wushinske, Esq.
Michael L. Swindler, Esq.
Bureau of Investigation & Enforcement
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
hwushinske@pa.gov
mwindler@pa.gov

Date: April 25, 2018



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	Docket No. C-2017-2599145
Complainant	:	
v.	:	
	:	
Xtreme Energy Company,	:	
Respondent	:	

**XTREME ENERGY COMPANY'S
PREHEARING CONFERENCE MEMORANDUM**

TO THE HONORABLE JOEL CHESKIS:

Pursuant to 52 Pa. Code § 5.222 of the regulations of the Pennsylvania Public Utility Commission (“Commission”) and the Prehearing Order of Deputy Chief Administrative Law Judge (“DCALJ”) Joel Cheskis issued on March 12, 2018, Xtreme Energy Company (“Xtreme Energy”) submits this Prehearing Conference Memorandum in connection with the above-captioned matter initiated by the filing of a Complaint and Notice of Amount Due by the Commission’s Bureau of Investigation and Enforcement (“I&E”) against Xtreme Energy.

I. BACKGROUND

1. On April 12, 2017, I&E filed a Complaint and Amount of Notice Due (“Complaint”) seeking to recover impact fees and administrative charges for calendar years 2014 and 2015 from Xtreme Energy, pursuant to Act 13 of 2012, the Unconventional Gas Well Impact Fee Act, 58 Pa.C.S. §§ 2301-2318 (“Impact Fee Act”). On May 18, 2017, Xtreme Energy timely filed an Answer and New Matter. By its Answer and New Matter, Xtreme Energy raised issues concerning the responsibility of the prior well producers during the years in question and whether

one of the wells meets the definition of a stripper well and is therefore exempt from the payment of impact fees and administrative charges. I&E filed a Reply to New Matter on June 6, 2017.

On March 6, 2018, the Commission issued a Hearing Notice to the parties, scheduling an Initial Hearing for May 2, 2018. By Prehearing Order issued on March 12, 2018, ALJ Cheskis directed the filing of Prehearing Memoranda by April 25, 2018.

On April 11, 2018, Xtreme Energy filed a Motion requesting that the Initial Hearing scheduled for May 2, 2018 be converted to a Prehearing Conference. Alternatively, Xtreme Energy requested that the May 2, 2018 Initial Hearing be held for the sole purpose of having I&E present its case-in-chief and that a subsequent date be selected for Xtreme Energy to present its evidence in defense of the Complaint.

On April 24, 2018, I&E filed an Answer not opposing Xtreme Energy's Motion with respect to the proposed conversion of the Initial Hearing to a Prehearing Conference. I&E, however, opposed Xtreme Energy's request for alternative relief where the Initial Hearing would be held for the sole purpose of having I&E present its case-in-chief and that a subsequent date would be selected for Xtreme Energy to present its evidence in defense of the Complaint.

On April 25, 2018, DCALJ Cheskis indicated that the Initial Hearing scheduled for May 2, 2018 will be converted to a Prehearing Conference. This Prehearing Conference Memorandum is submitted per the Prehearing Order issued on March 12, 2018.

II. SERVICE OF DOCUMENTS

Xtreme Energy requests that all documents be served on:

Karen O. Moury
Carl R. Shultz
ECKERT SEAMANS CHERIN & MELLOTT, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
Telephone: 717.237.6000
Fax: 717.237.6019

Xtreme Energy agrees to receive electronic service of documents in this proceeding. If materials are disseminated electronically, it is requested that copies be sent to kmoury@eckertseamans.com and cshultz@eckertseamans.com.

III. DISCOVERY

Xtreme Energy does not propose any modifications to the discovery rules that are set forth in the Commission's regulations.

IV. PROPOSED SCHEDULE

Xtreme Energy will either participate in the Initial Hearing that is currently scheduled for May 2, 2018 or cooperate with I&E in the development of a procedural schedule and will abide by the procedural schedule established by the DCALJ in this proceeding.

V. WITNESSES

Xtreme Energy expects to present the testimony of:

Michael Hahn, Vice President of Operations
Xtreme Energy Company
P.O. Box 2326
Victoria, TX 77902

Also, Xtreme Energy reserves the right to call other witnesses as necessary to address any issues that have been or are later raised during the course of the proceeding and will identify such additional witnesses within a reasonable period of time prior to the commencement of hearings.

Due to the extensive travel that would be required for Mr. Hahn to testify at a hearing in Harrisburg, Xtreme Energy believes that it would be more efficient for the parties to submit pre-

served testimony. It is possible that through the service of pre-served written testimony, the parties would be able to narrow the issues to the point that only legal matters remain, alleviating the need for Mr. Hahn to travel from Texas to Harrisburg for the hearings. By contrast, if the hearing is held for the purpose of receiving live testimony, without any awareness of the facts that I&E plans to present through its case-in-chief, Mr. Hahn will be required to travel to Harrisburg to ensure that facts are presented into the record that should not otherwise be in dispute, such as when Xtreme Energy purchased the wells in question and when the Department of Environmental Protection (“DEP”) issued permits for these wells.

Even if factual disputes would remain after the service of pre-served written testimony, Xtreme Energy believes it is worthwhile to make this attempt in the interest of promoting judicial economy and conserving resources, if only to narrow the issues. Therefore, Xtreme Energy proposes that I&E serve direct testimony and that Xtreme Energy submit rebuttal testimony within a reasonable period of time thereafter. As the party with the burden of proof, I&E would then have an opportunity to submit surrebuttal testimony. If any parties desire to conduct cross-examination or the DCALJ has any questions of the witnesses, only then would evidentiary hearings be required. Otherwise, the parties could move directly into briefing.

VI. ISSUES

I&E’s Complaint was filed pursuant to the Impact Fee Act, alleging that Xtreme Energy did not: (i) file Annual Reports for reporting years 2014 or 2015; (ii) pay administrative charges for reporting years 2014 or 2015; and (iii) pay impact fees for reporting years 2014 and 2015. The allegations pertain to two unconventional wells in Somerset County, for which Xtreme Energy holds permits from the DEP. In its request for relief, I&E seeks the payment of \$90,368 in impact fees, administrative charges, interest and penalties, along with a civil penalty of \$21,180.

The issues in this case include, but are not limited, to the following:

- 1) Whether Xtreme Energy was the operator of the two wells in question in reporting year 2014, given that the bill of sale for purchase of the wells from Samson Resources Corporation (“Samson”) to Xtreme Energy was dated February 19, 2015 and the permits were issued by DEP in April 2015 at Permit Nos. 111-20272 and 111-20277;
- 2) Whether Samson was the responsible operator of the two wells in question in reporting year 2015, given that Samson was still the operator of record for January 2015 and until the permits were issued by DEP to Xtreme Energy in April 2015, given that Act 13 does not provide for two different operators to be responsible for Act 13 obligations for a single reporting year;
- 3) Whether Xtreme Energy paid impact fees in the amount of \$30,200 for the two wells in question for reporting year 2015, as shown in the Commission’s Annual Report of Fund Revenue and Disbursements dated September 30, 2016;
- 4) Whether the well that is identified by Permit No. 111-20272, which produced on average less than 90,000 cubic feet of gas per day in the months of February, April, August, September, November and December of 2015 meets the definition in Act 13 of a “stripper well” and is therefore exempt from the payment of impact fees and administrative charges. 58 Pa. C.S. §2301. The issue of whether an unconventional well that produces on average less than 90,000 cubic feet of gas per day in any month qualifies as a stripper well is currently pending before the Supreme Court of Pennsylvania in the matter of *Snyder Brothers, Inc. v. Pa. Public Utility Commission*, 157 A.3d 1018 (Pa. Cmwlth. 2017), appeals pending at 47 and 48 WAP 2017;
- 5) Whether impact fees and administrative charges imposed by Act 13 constitute a tax within the meaning of that term as used in 1 Pa. C.S. § 1928(b)(3), such that any ambiguity must be resolved in favor of Xtreme Energy;
- 6) Whether Xtreme Energy was required to pay disputed impact fees, given the lack of any mechanism in the Commission’s procedures for challenging invoices or obtaining a refund of amounts that are later determined to have been improperly paid; and
- 7) Whether a civil penalty should be imposed even if the Commission ultimately determines that impact fees were due and not paid for reporting years 2014 and 2015, given the complexity of Act 13 and the grey area in which Xtreme Energy’s operations fall.

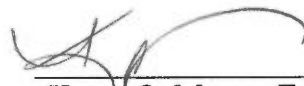
Particularly given the fact that it is likely that the Supreme Court decision in *Snyder Brothers* will cast light on the proper resolution of the stripper well exemption raised by Xtreme Energy, it would promote administrative efficiency to hold this matter in abeyance pending issuance of that decision. Of note, oral argument was held on April 11, 2018 in that appeal.

At a very minimum, Xtreme Energy requests that the briefing schedule be held in abeyance pending issuance of that decision. Otherwise, Xtreme Energy will be forced to make its legal arguments based on speculation as to whether the Supreme Court will uphold the Commonwealth Court decision, which would be favorable to Xtreme Energy, or if it will reverse that decision, which may result in Xtreme Energy making arguments that distinguish the present case from that ruling. Not knowing the “law of the land” on this issue would make briefing it very challenging. Also, if briefs are filed in this proceeding on the issue of whether one of the wells in question is exempt from the impact fees while the *Snyder Brothers* decision is pending and a decision is issued during the pendency of the proceeding, it is quite possible that Xtreme Energy will request that the matter be reopened for the submission of supplemental briefs.

VII. SETTLEMENT

Xtreme Energy is willing to engage in settlement discussions with I&E. Alternatively, Xtreme Energy believes that the parties may be able to narrow the scope of contested issues in this proceeding by entering into a joint stipulation of facts. To that end, Xtreme Energy provided a proposal for a joint stipulation of facts to I&E on April 16, 2018, which the parties are discussing.

Respectfully submitted,



Karen O. Moury, Esq. (PA ID #36879)
Carl R. Shultz, Esq. (PA ID #70328)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
Telephone: 717-237-6000
Email: kmoury@eckertseamans.com
cshultz@eckertseamans.com

Date: April 25, 2018

Attorneys for Xtreme Energy Company